No. 1144

Supreme Court of the United States

JOHN N. PRICE & SONS, a corporation,
Petitioner,

vs.

MARYLAND CASUALTY CO., a corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

Preliminary Statement.

The Circuit Court of Appeals decided this case upon the authority of *Brooks-Wright, Inc.* v. *Maryland Casualty Company,* 135 N. J. Eq. 510, decided October 16, 1944 by the court of last resort in New Jersey, the law of which is applicable here on the substantive questions involved (R. 109).

This and the *Brooks-Wright* case grew out of the same municipal construction project, involve the same surety bond, contract and general contractor and embody substantially parallel transactions among the parties within each. *Brooks-Wright* v. *Maryland,* opinion of Vice-Chancellor, 133 N. J. Eq. 15; opinion of District Judge in this case, R. 89A, *et seq.*; *Brooks-Wright* v. *Maryland,* 135 N. J. Eq. 510; opinion of C. C. A. below, R. 108, *et seq.* When the *Brooks-Wright* case stood in petitioner's favor, it was urged as controlling here (R. 109). After reversal of

Brooks-Wright "distinguishing features" (Petition, p. 3) are found in the case at bar and are urged in the petition for the writ to have been controlling, to the error of the Circuit Court of Appeals.

Facts.

The respondent was surety on a statutory general contractor's performance bond for the construction of a public school by the Board of Education of the City of Paterson, New Jersey (R. 102). The contract (R. 100, *et seq.*) provided that the Board may withhold so much of any approved payment due the contractor as may in its judgment be necessary to assure payment of claims of subcontractors (p. 101, clause 33). The specifications contained an assignment from the Board to the surety of all payments due under the contract in the event of claim or default under the bond.

When the school was completed the Board had retained, in accordance with the contract, about $33,000 (R. 53a, 79a) and the general contractor owed the petitioner, a subcontractor, about $3,500 (R. 49a).

The Board notified the contractor that before it would pay him it would require the releases of all subcontractors (R. 39a, 56a, 69a). Petitioner knew these releases had to be submitted to the Board before the contractor would be paid, and for that reason executed its release and delivered it to the contractor (R. 27a, 28a, 29a), receiving in turn an "escrow agreement" (Ex. P-5, R. 104) and a post-dated check (R. 28a). The surety did not know of the existence of this agreement, or that petitioner had not been paid, nor was any attempt made to bring such knowledge

to it. The contractor delivered this release, with others, to the architect for the Board (R. 46a) who gave them to the Board's attorney (R. 51a) who in turn passed upon their legal sufficiency and then instructed that a check for the retained moneys be drawn (R. 53a, 75a). The check (R. 71a) was deposited by the contractor (R. 53a) and a large part of it appropriated by its bank (R. 46a). Payment of the post-dated check was stopped and the contractor thereafter was adjudicated a bankrupt (R. 79a).

With these facts the district judge followed the path of reasoning laid down by the Vice-Chancellor in the *Brooks-Wright* case. He thought that the release here was given "under like circumstances" (R. 92a) to those in the *Brooks-Wright* case, and like the Vice-Chancellor, he thought those circumstances, which he called fraudulent (R. 93) rendered the release ineffectual for any purpose. In ruling that the surety was not prejudiced by the release the district judge followed the Vice-Chancellor in relying upon *Cartun* v. *Meyers and O'Donnell* v. *McCann*. These cases reappear on page 10 of the petitioner's brief.

In reversing the trial court in the *Brooks-Wright* case, the Court of Errors and Appeals (in 135 N. J. Eq. 510) did not pause over the technicalities of estoppel or the nature of a release under seal where the parties to it did not intend it to be effective as between them, but fastened at once upon a cardinal principle of suretyship—that as between an innocent surety and a creditor whose voluntary act makes possible the dissipation of security to which the surety may resort in order to pay the debt, the creditor must bear the loss.

The Petition.

The burden of the petition is that the facts of this case differ so widely from those of the *Brooks-Wright* case that to rely upon it brings the Circuit Court decision in conflict with the law of New Jersey.

"Applicable local decisions" (Supreme Court rule 38, § 5b) in conflict with the Circuit Court on the point in issue are not advanced, nor has the respondent been able to find any. The only New Jersey cases cited by petitioner deal with estoppel in pais, whereas the question at issue is one of suretyship and the impairment, release or dissipation of security.

The sole circumstances present in this case and absent from the *Brooks-Wright* case are (a) the written "escrow agreement" and (b) evidence that the architect for the Board and possibly its secretary were told that when petitioner made and delivered (R. 8a) its release to the contractor, petitioner had not been paid.

As for the "escrow agreement", without the intervention of a third party to hold the escrow, delivery of an instrument complete on its face directly to the grantee (or obligee, or releasee) passes the instrument to him absolutely "detached from all extraneous conditions," "by force of an imperative rule of law." *Ordinary* v. *Thatcher*, 41 N. J. Law 403, 409, citing *Dair* v. *United States*, 16 Wall 1; approved *Acquackononk B. & L. Ass'n.* v. *Christenson Drug Co.*, 122 N. J. Eq. 353, affirmed 123 N. J. Eq. 574, Court of Errors and Appeals, 1937.

Further, the "escrow agreement" (which the man who exacted it did not understand (R. 32a)) was manifestly de-

signed to protect the petitioner in the preservation of its claim against the contractor. Not accompanying the release or brought home to the surety, it is ineffectual against it, even if effective between the parties. As in the *Brooks-Wright* case it was not intended that the release would discharge the debt between the parties, and, as there, a third party, the surety, was affected. The release was intended for use, else it would not have been executed. What use of it was intended is shown by the action of the releasor, who after its execution and delivery, turned to the architect for the Board (R. 28a) and the clerk of the Board (R. 29a, 30a) to ascertain when the retention would be paid. Where an instrument complete on its face is given to be used, if only for accommodation and without consideration, it is binding upon the maker. *Sweeney* v. *Williams*, 36 N. J. Eq. 459.

Then, although petitioner persists in so saying, we do not think that knowledge by the Board that petitioner had not been paid has been established. It may suffice to say that the trial court did not find such knowledge on the part of the Board, or relied thereon in arriving at its decision, from aught that appears.

In any case, the fact that petitioner had not been paid on September 20th (R. 51a) or September 21st (R. 53a) when the release was passed upon by the attorney and payment to the contractor authorized, is not shown by proving that petitioner conversed with the architect for the Board on September 11 (R. 28a) and with the secretary of the Board on September 12th or 13th (R. 29a). These men were without authority to pass upon legal matters for the Board or direct payment to be made, whereas it does appear that the attorney for the Board required the release in its behalf,

was charged with passing thereon, knew nothing of the non-payment of petitioner (R. 50a, 53a, 54a, 56a, 64a, 69a).

If the Board did have knowledge, it would simply mean that both it and the petitioner were tarred with the same brush, that both violated a duty to the surety to do nothing to impair the security fund. *Brooks-Wright* v. *Maryland, supra; Town of Guttenberg* v. *Vassell*, 74 N. J. L. 553; *Meyer* v. *Standard Accident Insurance Co.*, 114 N. J. L. 483 at 490. The bond is furnished by the contractor for the benefit of both the Board and the sub-contractors. *Franklin Lumber Co.* v. *Globe Indemnity Co.*, 102 N. J. L. 9, affirmed, 102 N. J. L. 715. The reservation is for the benefit of the surety—available by subrogation. *Brooks-Wright* v. *Maryland, supra; Jersey City Water Supply Co.* v. *Metropolitan Construction Co.*, 76 N. J. L. 419; *St. Peter's Catholic Church* v. *Vannote*, 66 N. J. Eq. 78. It does not seem that a participant in eliciting the reservation can excuse himself from bearing the loss by urging that another beneficiary of the same bond (*Franklin Lumber* case, *supra*) participated. The result to the surety is the same.

Jurisdiction and this Application.

We apprehend that review on certiorari is not a matter of right, but of sound judicial discretion "and will be granted only where there are special and important reasons therefor." Supreme Court Rule 38. The "distinguishing features" urged by the petitioner appear not to touch upon the principle involved but to be concerned with reviewing the evidence or inferences drawn from it as to estoppel and fraud. A writ of certiorari is not generally

granted for such purpose. *General Talking Picture Corporation* v. *Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849.

The basis of the contention before the Vice-Chancellor in the *Brooks-Wright* case was that the surety could be in no better position than its principal who took the release on the express condition that it was not to affect the debt to the subcontractor. So the trial judge here found fraud in the principal which he thought estopped the surety (R. 94a). In both cases the rules of suretyship were left unnoticed.

The rule is catholic that where a creditor releases a principal, the surety is discharged. Restatement of Security, P. 322 Sec. 122. Assuming such fraud as the trial court found, the innocent surety is nonetheless entitled to be discharged to the extent of its loss.

"Where, induced by fraud or duress on the part of the principal, the creditor seasonably rescinds the release, the surety's obligation is discharged only to the extent that he has been prejudiced."

"Comment b * * * Since the creditor rather than the surety is responsible for the release, the creditor must suffer whatever loss the surety can show is due to the release." *Restatement of Security*, Sec. 123, pages 325, 326.

It is respectfully submitted that there is nothing in the petition and supporting brief to move the court to allow a writ, and that the petition therefor should be denied.

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Attorney and Counsel for Respondent.